DIVISION OF EMPLOYMENT SECURITY
NC DEPARTMENT OF COMMERCE

PRECEDENT DECISION NO. 21

IN RE ROECKER
(Adopted August 31, 1987)

STATEMENT OF CASE:

The claimant filed a NEW INITIAL CLAIM (NIC) for unemployment insurance benefits effective October 19, 1986. Thereafter, the Commission determined that the weekly benefit amount payable to the claimant was $184.00, and during the benefit year established by the claimant, the maximum amount of unemployment insurance benefits payable to the claimant was $4,784.00.

The claim was referred to an ADJUDICATOR on the issue of SEPARATION FROM LAST EMPLOYMENT. The Adjudicator, Miriam Byrd, issued a determination under DOCKET NO. 1123-IV on November 4, 1986, finding the claimant disqualified for benefits pursuant to N.C. Gen. Stat. §96-14(2). The claimant filed an APPEAL from the ADJUDICATOR'S determination and the matter came on to be heard by an APPEALS REFEREE under APPEALS DOCKET NO. V-UI-52401T. The following individuals appeared at the hearing before the Appeals Referee: Robin D. Roecker, claimant; M. Catherine Tamsberg, attorney for claimant; Mike Plueddemann, employer witness. On December 30, 1986, Mitchell A. Wolf, Appeals Referee, issued a decision finding the CIAIMANT NOT DISQUALIED to receive benefits pursuant to N.C. Gen. Stat. §96-14(2) or (2A). The EMPLOYER APPEALED. Pursuant to the claimant's request, a Commission hearing to consider arguments on points of law was held on February 5, 1987. Appearing for the hearing were: M. Catherine Tamsberg and Victor Boone, attorneys for the claimant; Margie T. Case, attorney for the employer; V. Henry Gransee, Jr., Deputy Chief Counsel, appeared representing the Commission.

FINDINGS OF FACT:

1. At the time the Claims Adjudicator issued a determination in this matter, the claimant had filed continued claims for unemployment insurance benefits for

the period October 19, 1986 through October 25, 1986. The claimant has registered for work with the Commission, has continued to report to an employment office of the Commission and has made a claim for benefits in accordance with N.C. Gen. Stat. §96-15(a).

2. The claimant last worked for Daniel Construction on October 16, 1986. The claimant was last employed as an Electrical Engineer Aide III and had worked since August 1984 for this employer.

3. The claimant was discharged from this job for wilfully and without good cause refusing to take a urinalysis test.

4. On June 27, 1986, the claimant had acknowledged the employer's drug and alcohol abuse policy dated June 13, 1986, and had signed the form regarding it. (Employer's Exhibit #1)

   In part, the form she signed stated, ". . . I understand the Company's policies and practices on drug and alcohol abuse and I agree to abide by them. I further understand that compliance with the provisions of the Company's drug and alcohol abuse policies and practices is required in order to remain on Company property or to work on any Company projects . . . ." (Employer's Exhibit #1) Pursuant to this policy, in the fall of 1986, the employer began testing all employees who had less than three years of security clearance at the direction of Carolina Power and Light, the owner of the Shearon Harris Nuclear Power Plant where the claimant was employed for the employer.

5. On October 16 1986, the claimant was directed to submit to a urinalysis test. She gave the employer no reason for her refusal because she " . . .didn't feel like that it would benefit [her] in any way to . . . [give my] . . . reasoning . . ." to the employer. (Transcript p. 33) While being examined on direct by her attorney, she testified:

   Q: Why did you refuse to submit to the test?

   A: I felt that it was a form of, of really of harassment. I was due to be released from the Shearon Harris project on November the 14th, which was less than a month from the day that they asked me to take the urinalysis. And I felt that it was probably the start of a form of harassment. And I decided that I did not want to be ill-treated, so I chose not to take the urinalysis.

Q: When you use the term harassment, what made, what makes you choose that word? Mr. Plueddemann has said everybody was being tested. Why do you feel like it was harassment?

A: Because I was so close to my release date, being November the l4th, that I just felt like it was a start of more to come. Of, I don't know, maybe harassment isn't the right word. But it just seems like a wasted cause to start processing someone through that when they are so close to being released. (Transcript, p. 34)

It is found as fact that the claimant refused to take the urinalysis test only because of the closeness of her release date on November 14, 1986. She made no attempt to discuss the refusal with the employer even though she knew she further could have talked about any questions she had with the test with Mike Plueddemann, the Senior Industrial Relations Representative for the employer.

6. Although the Appeals Referee found in his finding No. 17 that the claimant had "several reasons" for her refusal, neither her testimony nor that of the employer's witness supports his finding. As found in finding No. 5, she did not give the employer any reason for her refusal, even though she knew she could have discussed it, and the only reason she gave for her refusal to the attorney in direct examination was "harassment" -- because of her impending layoff. It specifically is found that the employer was not harassing the claimant by directing her to take the test since it was complying with its contractor's requirements for the policy to which the claimant had agreed in writing on June 27, 1986.

7. The employer's "Drug and Alcohol Abuse Policy" (Employer Exhibit 1) is found to be reasonable and work-related.

MEMORANDUM OF LAW:

The Employment Security Law of North Carolina provides:

An individual shall be disqualified for benefits . . . [f]or the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the

> Commission that such individual is, at the time such claim is filed, unemployed because the individual was discharged for misconduct connected with his work.

N.C. Gen. Stat. §96-14(2)

Misconduct connected with the work is conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. N.C. Gen. Stat. §96-14(2). This definition has been judicially interpreted on many occasions. See, e.g., Williams v. Burlington Industries, 318 N.C. 441, 349 S.E.2d 842 (1986); Intercraft Industries Corporation v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982); Yelverton v. Kemp Furniture Industries, 51 N.C. App. 215, 275 S.E.2d 553 (1981); In re Cantrell, 44 N.C. App. 718, 263 S.E.2d 1 (1980); In re Collingsworth, 17 N.C. App. 340, 194 S.E.2d 210 (1973).

The Employment Security Law further provides:

> An individual shall be disqualified for benefits . . . [f]or a period of not less than four nor more than 13 weeks beginning with the first day of the first week during which or after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time the claim is filed, unemployed because he was discharged for substantial fault on his part connected with his work not rising to the level of misconduct. Substantial fault is defined to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment. Upon a finding of discharge under this subsection, the individual shall be disqualified for a period of nine weeks unless, based on findings by the Commission of aggravating or mitigating circumstances, the period of disqualification is lengthened or shortened within the limits set out above. The length

> of the disqualification so set by the Commission shall not be disturbed by a reviewing court except upon a finding of plain error.

N.C. Gen. Stat. §96-14(2A).

In a case where the claimant was discharged from his work, the employer has the burden to show that the claimant's discharge was for a disqualifying reason. Intercraft, 305 N.C. at 376. It is concluded from the competent evidence in the record mid the facts found therefrom that the claimant's refusal to take the urinalysis test was wilful and without good cause. The claimant had agreed to the employer's policy and wilfully refused to abide by her agreement without discussing her change of position with the employer or even telling the employer her reason. The opinions she expressed at the hearing as to her feelings, the unauthenticated affidavit and the article offered are irrelevant.

The Commission has no position on the appropriateness of drug testing in the work place as a policy. If an employer has promulgated such a policy and the employee has agreed to such policy either explicitly as herein or implicitly by continuing to work after the policy has been communicated to her, such becomes a rule or policy of the work. An employee's subsequent change of position does not give her good cause to refuse to take the test. Whether employers, employees, or unions should adopt or should not adopt such policies is outside the jurisdiction of this Commission. Except for public employment, which does not apply herein, no "probable cause" or "reasonable basis" standard is constitutionally or statutorily required, although were it relevant herein, the Commission would find such had been shown.

Commission views this issue similarly to polygraph examinations. Once polygraph examinations are part of the work, the refusal without good cause to submit to one is disqualifying. The agreement to a polygraph or other similar examinations can be shown either in the original agreement of work or its being adopted thereafter either by specific or explicit agreement by the employee or implicit agreement or ratification by the employee's continuing in work.

The difference from polygraph to substance testing cases relates to results. Polygraph results cannot be admitted or used by courts or the Commission. State v. Grier, 307 N.C. 628, 300 S.E.2d 351 (1983). Drug or substance test results, however, can be used provided the employer shows by competent evidence a chain of custody for the tested sample, the reliability of the test, and exactly how the claimant violated

the policy of the employer. It would seem an expert witness would be necessary to prove any case involving substance test results.

In this case, the claimant had agreed in writing to a rule, then wilfully violated it without good cause. Such is misconduct connected with work. Employment Security Com. v. Smith, 235 N.C. 104, 69 S.E.2d 32 (1952).

The claimant is, therefore, disqualified for unemployment insurance benefits. Pursuant to N.C. Gen. Stat. §96-9(c)(2)b., no overpayment of benefits already paid is established by this decision.

DECISION:

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the decision of the Appeals Referee is **REVERSED**, and the CLAIMANT is **DISQUALIFIED** for unemployment insurance benefits beginning October 19, 1986.